83-774

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HRATCH K. SARIAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard A. Sprague
William R. Herman
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, Pa. 19103
(215) 561-7681
Counsel for Petitioner,
Hratch K. Sarian

Of Counsel:
SPRAGUE & RUBENSTONE
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, Pa. 19103
(215) 561-7681

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below was erroneous and in conflict with those of other circuits that an indictment charging distribution of or conspiracy to distribute drugs in violation of the Controlled Substances Act must allege that the distribution occurred for reasons other than legitimate professional ones, where the person so accused is a health professional who is authorized to distribute controlled substances.

2. Whether the decision below was erroneous and in conflict with that of the Sixth Circuit in *United States v. Jones* that Federal Rule of Evidence 201(g) and the Sixth Amendment preclude the trial judge in a criminal case from instructing the jury that it must take as a matter of law facts which ought to have either been proven by the prosecution or made the subject of judicial notice, where those facts are necessary to establish an element of the offense.[1]

---

1. On appeal to the Third Circuit, petitioner also raised the issue of the sufficiency of the evidence as to each count of the indictment. While petitioner recognizes that this question does not independently warrant a request for a writ of certiorari, petitioner would seek to present it to the Court if certiorari is granted on either or both of the questions discussed in this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES

Cases: Page

REGULATIONS

RULES

MISCELLANEOUS

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HRATCH K. SARIAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Hratch K. Sarian, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on August 5, 1983.

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction was filed on August 5, 1983 and appears in the Appendix at A1. The United States District Court for the Eastern District of Pennsylvania issued no opinions in connection with this case.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, entered on August 5, 1983, appears in the Appendix at A6. On September 7, 1983, the Third Circuit denied petitioner's timely petition for rehearing and rehearing *en banc* (A7), and this petition for certiorari was filed within 60 days of that date. This Court's juridiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

Controlled Substances Act, 21 U.S.C. §801 et seq.

21 U.S.C. §802. *Definitions* — As used in this subchapter:

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter . . . .

* * * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such

delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

* * * *

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . ., to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice . . . .

21 U.S.C. §812. *Schedules of controlled substances.*

Establishment. (a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished . . . .

21 U.S.C. §822(b). *Authorized activities.*

Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

21 U.S.C. §841. *Prohibited acts.*

Unlawful acts. (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; . . . .

21 U.S.C. §846. *Attempt and conspiracy.*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 201(g), Federal Rules of Evidence

Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

Petitioner Hratch ("Harold") K. Sarian and his co-defendants, Paul F. Gaynor and Samuel I. Guttler, all registered pharmacists, were indicted for conspiring to distribute controlled substances, in violation of 21 U.S.C. §846, and for distributing controlled substances, in violation of 21 U.S.C. §841(a)(1). Mr. Sarian was also charged with failing to make, keep or furnish required records and omitting material information from such records. 21 U.S.C. §§842(a)(5), 843(a)(4).[2] The charges all arose out of the operation of a pharmacy which petitioner Sarian owned and where Gaynor and Guttler worked.

On August 19, 1979, Mr. Sarian had acquired what had been Gene's Pharmacy at 4745 North 11th Street in Philadelphia, Pennsylvania, and renamed it Harold's Prescription Pharmacy. After having worked for over twenty years — often for sixty to eighty hours a week — for others, Mr. Sarian bought his own drug store so that he would have more time to spend with his family and friends. Accordingly, he decided to limit his job to administrative tasks which could be carried out from his home or performed quickly in the pharmacy and hired Gaynor and Guttler, two experienced registered pharmacists, to run the store itself. Mr. Sarian came to the pharmacy for approximately an hour before closing time each day and worked as a pharmacist filling prescriptions only on the rare occasions when neither Gaynor nor Guttler could be there.

On September 10, 1980, Roger P. Lawyer and Janice Barnes, two investigators from the Drug Enforcement Administration ("DEA"), appeared at Harold's Prescription Pharmacy to perform what Lawyer termed "a routine investigation of pharmacy records and controlled substances." At trial, Lawyer testified that the investigation, which was conducted under the authority of an ad-

2. The indictment is printed in the Appendix at A10.

ministrative warrant, showed that the pharmacy had ordered and received greater quantities of seven selected drugs than could be accounted for by prescriptions in the pharmacy's files. On the other hand, there were more prescriptions in the files for an eighth drug, Percodan, than records showed had been received.

The government's case also consisted of testimony from five physicians who testified that some of the prescriptions found in the pharmacy's files which were written in their names had been forged.[3] Additionally, three pharmacists who had worked at the drug store as interns while attending pharmacy school testified. One stated that she had often witnessed the filling by Gaynor of prescriptions which she did not feel were legitimate, but had never seen Mr. Sarian do anything wrong. The other two former interns claimed to have seen individuals leaving the store with the Schedule V drug Bromanyl[4] after meeting with Mr. Sarian, and one said that she thought that Mr. Sarian had filled questionable prescriptions for either Bromanyl or Talwin on an occasion or two after the time period covered by the indictment. Like the first former intern, the other two said that it was Gaynor who had filled all but a scant few of the prescriptions which they viewed as illegitimate. Additionally, two of the interns testified that when they challenged Gaynor for placing their initials on questionable

---

3. The government submitted handwriting exemplars from Mr. Sarian to an expert, who was unable to identify any of the writing on the prescriptions as Mr. Sarian's.

4. The schedules of controlled substances are based upon abuse potential, with Schedule II drugs being more highly abused than Schedule III substances, Schedule III reflecting more abuse than Schedule IV, and Schedule IV drugs exceeding in abuse those in Schedule V. *See* 21 U.S.C. §812. The record shows that Gaynor and Guttler, the working pharmacists, were responsible for ordering Schedule III, IV and V drugs, while Mr. Sarian ordered those in Schedule II when the stock in the pharmacy's safe seemed depleted.

prescriptions, which indicated that they had filled them, Gaynor had removed their initials and replaced them with Mr. Sarian's.

Bernard Parker, an admitted drug addict who was awaiting sentencing, testified that all three defendants filled forged prescriptions for cough medicines for him, and later provided him with larger quantities of the drugs. When the petitioner presented his case, however, two of the store's cashiers testified that they had seen Parker loitering in the store, but that Mr. Sarian would have nothing to do with him and, indeed, had chased him out of the pharmacy on at least one occasion.

In uncontradicted testimony, Mr. Sarian stated that since he was only in the store for short periods, it was the responsibility of Gaynor and Guttler to order the Schedule III, IV and V substances, fill prescriptions, and, along with the interns, see to it that those prescriptions were properly filed. Mr. Sarian said that he did not examine the filed prescriptions for form or to see whether they appeared legitimate; that was the job of the two experienced pharmacists whom he had hired to operate the business on a day-to-day basis. Mr. Sarian firmly denied that any drugs had gone out of the store without legitimate prescriptions while he was there, that he had ever illegally sold Bromanyl or any other drug to Bernard Parker or to anyone else, or that he had received money for illegal drugs. He also testified that the initials "H.S." on forged prescriptions had not been placed there by him.

On June 24, 1982, the jury returned a verdict of guilty on all counts against petitioner and his two co-defendants. Notice of appeal was timely filed by petitioner following the imposition on August 30, 1982, of an aggregate sentence of ten years of imprisonment, five years of special parole, five years of probation consecu-

tive to incarceration, and a $25,000 fine.[5] On August 5, 1983, in an unpublished per curiam opinion, the Third Circuit affirmed the convictions and, on September 7, 1983, denied Mr. Sarian's petition for rehearing and rehearing *en banc*. The Third Circuit has stayed issuance of its mandate pending disposition of the instant petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Those of Other Circuits that an Indictment which Charges a Person Authorized to Distribute Controlled Substances with a Violation of 21 U.S.C. §841(a)(1) Must Allege that the Distribution Was Not For Legitimate Medical Reasons.

Count One of the indictment charged petitioner with conspiring to distribute controlled substances, in violation of 21 U.S.C. §846, while Counts Two through Six accused him of the actual distribution of such substances, in violation of 21 U.S.C. §841(a)(1). Neither the counts which accused petitioner of distribution nor the

---

5. The trial court's sentence was as follows: Ten years of incarceration plus three years of special parole on Count Two (distribution of Dilaudid and Percodan, Schedule II narcotic controlled substances); five years plus three years of special parole on Count Three (distribution of Preludin, Ritalin and Quaalude, Schedule II non-narcotic controlled substances); five years plus three years of special parole on Count Four (distribution of Tussionex suspension, a Schedule III narcotic controlled substance); three years plus five years of special parole on Count Five (distribution of Talwin, a Schedule IV non-narcotic controlled substance); one year on Count Six (distribution of Bromanyl, a Schedule V narcotic controlled substance); four years on both Counts Seven (placing false and fraudulent prescriptions in the pharmacy files) and Eight (failing to retain copies of invoices); and one year on Count Nine (failing to record on required forms the date and quantity received of purchases of Schedule II substances). All these sentences were to be served concurrently. Additionally, the court sentenced petitioner to a fine of $25,000 plus five years of probation consecutive to incarceration on Count One (conspiring to distribute controlled substances).

charging language of the conspiracy count alleged that petitioner's actions were taken outside the bounds of legitimate professional practice.

21 U.S.C. §841(a)(1) does not proscribe all distributions of controlled substances, but only those which are not authorized, for the statute provides, in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . ." Licensed pharmacists, such as Mr. Sarian, are among those who may register with the Attorney General, pursuant to Section 822(b), to dispense controlled substances, thereby permitting them to dispense and distribute such drugs. 21 U.S.C. §§802(20), 822(b); *see United States v. Outler*, 659 F.2d 1306, 1309 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

The statute on its face thus appears to allow a physician or pharmacist who is registered with the Attorney General to distribute drugs freely and for whatever reason. Indeed, the District of Columbia Circuit so held in *United States v. Moore*, 505 F.2d 426 (D.C. Cir. 1974), *rev'd*, 423 U.S. 122 (1975); *see also United States v. Outler*, *supra*, 659 F.2d at 1309. This Court reversed the D.C. Circuit, however, and held that the Controlled Substances Act implicitly requires that the distribution be within the bounds of legitimate professional practice. *United States v. Moore*, *supra*, 423 U.S. at 141 (1975).

Nevertheless, because the statute presumptively permits the millions of registered practitioners in this country to distribute controlled substances, the First, Fifth, Ninth and Tenth Circuits have held that when an authorized distributor of controlled substances is charged with a a violation of Section 841(a)(1), the government must prove beyond a reasonable doubt that the distribution was not for legitimate medical reasons. *United States v. Guerrero*, 650 F.2d 728, 730 (5th Cir.

1981); *United States v. Rogers*, 609 F.2d 834 (5th Cir. 1980); *United States v. Black*, 512 F.2d 864 (9th Cir. 1975); *United States v. Bartee*, 479 F.2d 484 (10th Cir. 1973); *see generally United States v. Moore*, *supra*. When a registered practitioner is charged with distributing drugs in violation of the Controlled Substances Act, the offense is therefore as follows:

> [D]istribution of controlled substances not authorized by §822(b) because either (1) the physician issuing the prescription was not registered, or (2) the prescription was not "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

United States v. Black, *supra*, 512 F.2d at 868.

The Fifth and Ninth Circuits have also held that the necessity of proving that distribution occurred for reasons other than legitimate medical ones requires that the absence of a professional reason for the distribution be alleged in the indictment where the defendant is one, such as petitioner here, who is otherwise authorized to dispense controlled substances. *United States v. Outler*, *supra*, 659 F.2d at 1309; *United States v. King*, 587 F.2d 956, 962-64 (9th Cir. 1978). *Contra, United States v. Seelig*, 622 F.2d 207 (6th Cir. 1980), *cert. denied*, 449 U.S. 869 (1981). The reason for this requirement was succinctly stated by the Fifth Circuit in *Outler*, *supra*:

> We recognize that an element is not always an "essential element" simply because the prosecution carries the burden of proof; however, *here, the element embodies the culpability of the offense. Without behavior beyond professional practice, there is no crime.* We believe, therefore, that *the lack of a legitimate medical reason is as essential to the offense charged against Dr. Outlar [sic] as the requisite mens rea.*

Id., 659 F.2d at 1309 (emphasis added).

In this case, the Third Circuit refused to decide explicitly whether it was essential for the indictment to allege that the drug distribution with which Mr. Sarian was charged occurred outside of the legitimate bounds of his professional practice. Instead, because trial counsel had not objected to the indictment at trial, the Court of Appeals stated that it would assume *arguendo* that the allegation which was missing from the indictment should have been included in it but would reverse only if petitioner were thereby substantially prejudiced. *See Opinion of the Court* at 3-4, printed at A3.

The Circuit Court then found that both of an indictment's functions — "protect[ing] the defendant's sixth amendment right to be informed of the charges against him and . . . uphold[ing] the fifth amendment guarantee that prevents prosecution for infamous crimes without an indictment by a grand jury", *Opinion of the Court* at 4, printed at A4, *citing Russell v. United States*, 369 U.S. 749, 763-64 (1962) — were satisfied in Mr. Sarian's case.[6] The Court of Appeals adverted to an overt act alleged in the conspiracy count which stated that the defendants had placed orders for and received drugs in order to sell them outside the ordinary course of the pharmacy's business. This allegation, the court held, met petitioner's contention that the indictment did not sufficiently show that the grand jury had found probable cause that the distribution alleged in each count had occurred for other than legitimate professional reasons. The court found "it reasonable to infer [from the alleged overt act] that the grand jury had before it evidence of defendant's excesses and indicted him for his activity outside legally permissible limits as a pharmacist." *Opinion of the Court* at 5, printed at A4.

This cross-fertilization between the recitation of an overt act in the conspiracy count and the charging lan-

6. Petitioner had never argued that the indictment had trespassed upon his rights to notice nor upon his right to be protected against double jeopardy.

guage of both that count and the substantive counts conflicts not only with the holding of this Court in *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535-36 (1915), but also with the Third Circuit's own opinion in *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), where it held that:

> [a]lthough the overt acts section in the indictment appears to include [a] missing element, this does not cure the insufficiency. "[U]nless the charging part of a conspiracy count specifically refers to or incorporates by reference allegations which appear under the heading of overt acts, *resort to those allegations may not be had to supply the insufficiency in the charging language itself.*"

Id., at 1259, *quoting United States v. Knox Coal Co.*, 347 F.2d 33, 38 (3d Cir.), *cert. denied sub nom. Lippi v. United States*, 382 U.S. 904 (1965) (emphasis added). A fortiori, if an overt act cannot be used to supply a missing element in the charging language of the conspiracy count, it cannot be exported to save an otherwise deficient substantive count.

Furthermore, the Court of Appeals' leap from the likelihood that the grand jury heard evidence that the distribution was not for legitimate professional reasons, an inference which it drew from the presence in the indictment of the allegation of the overt act, to the conclusion that the grand jury had found probable cause as to that element of the offense overlooks *Russell v. United States*, *supra*, where this Court stated:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.

369 U.S. at 770; *see also United States v. Beard*, 414 F.2d 1014, 1016 (3d Cir. 1969).

The grounds advanced by the Court of Appeals to cure the defect in the indictment are therefore unpersuasive. Moreover, the failure of an indictment to charge an offense is a fundamental defect which can be raised at any time. *United States v. Wander, supra*, 601 F.2d at 1259; *United States v. McGhee*, 488 F.2d 781, 783 n.2 (5th Cir. 1974), *cert. denied sub nom. Bunner v. United States*, 417 U.S. 949 (1974); Rule 12(b)(2), Fed.R.Crim.P. The Third Circuit's affirmance of petitioner's convictions on Counts One through Six of the indictment can therefore only be explained as a rejection of the principle enunciated by the Fifth and Ninth Circuits that an allegation of distribution outside of legitimate professional practice is necessary to charge a violation of 21 U.S.C. §841(a) against a pharmacist or a physician.

Given the frequency with which health professionals are indicted under the Controlled Substances Act, petitioner therefore submits that this case raises an important question of federal law as to which there is conflict among the circuits, and that this conflict, to which *Moore* did not speak, should now be resolved by this Court.

II. The Decision Below Conflicts with That of the Sixth Circuit in *Jones v. United States*, For It Sanctioned an Instruction which Charged the Jury to Take as a Matter of Law Facts which the Jury Should Have Been Free to Ignore.

The Controlled Substances Act makes illegal the distribution of a "controlled substance", 21 U.S.C. §841(a)(1), a term which is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V . . . ." 21 U.S.C. §802(6). The drugs which are included in each schedule are listed in

21 U.S.C. §812(c) and in 21 C.F.R. §§1308.11-1308.15[7] not by their brand names but rather by their chemical names or by the amount of proscribed substances (such as codeine) which they contain.

With only two exceptions, the indictment here did not identify the drugs which petitioner was accused of distributing by their chemical names, as contained in the statute and regulations, but used their brand names instead[8]. *See Indictment*, printed at A8-13. *Cf. United States v. Hinkle*, 637 F.2d 1154, 1156 n.1 (7th Cir. 1981); *United States v. Goodman*, 605 F.2d 870, 883 n.16 (5th Cir. 1979); *United States v. Kirk*, 584 F.2d 773, 775 (6th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1978). One will search at length and in vain to find those brand names in the schedules contained in 21 U.S.C. §812(c) and 21 C.F.R. §§1308.11-1308.15.

Moreover, aside from the conclusory testimony of DEA Agent Lawyer, who said that the brand name drugs listed in the indictment fell into the various schedules but did not once mention the chemical names of those drugs, and the testimony of one physician that Bromanyl contains codeine and of another that Tussionex also contains codeine,[9] the government did not even attempt to forge an evidentiary link between the brand names in the indictment and the chemical names in the statute and regulations. This was so even though nothing could be more essential to the presentation of a prima facie

---

7. 21 U.S.C. §811 grants to the Attorney General the authority to add or remove drugs from the initial schedule which is contained in Section 812. The schedules in the Code of Federal Regulations are promulgated pursuant to this authority. *See also* 21 U.S.C. §§812, 871(b).

8. The two exceptions were the identification of Quaalude tablets as methaqualone in Counts One and Three and Tussionex suspension as hydrocodone in Counts One and Four.

9. The latter is incorrect. Tussionex contains hydrocodone. *Physician's Desk Reference* 1481 (36th ed. 1982). Substances containing codeine are Schedule V substances, not Schedule III, as Tussionex was alleged to be. *See* 21 C.F.R. §1308.15.

case against an individual who is charged with conspiring to distribute or with distributing controlled substances than proof that the drugs involved are among those proscribed by the statute or regulations. *See United States v. Hall*, 552 F.2d 273, 274 (9th Cir. 1977).

As a result, the government's evidence was clearly insufficient to sustain a conviction. Far more important, however, was the violation of Rule 201(g), Fed.R.Ev., and of the petitioner's right to a trial by jury which resulted from the trial judge's attempt, through his instructions to the jury, to cure the deficiency in the evidence. The jury was instructed as follows:

> Count 2 charges defendants with the distribution of the Dilaudid and Percodan tablets which are Schedule II narcotic controlled substances.
>
> Count 3 charges defendants with distribution of Preludin, Ritalin and Quaalude tablets which are Schedule II non-narcotic substances.
>
> Count 4 charges defendants with distribution of Tussionex suspension, a Schedule III narcotic controlled substance.
>
> Count 5 charges defendants with distribution of Talwin tablets, a Schedule IV nonnarcotic substance.
>
> Count 6 charges defendants with distribution of Bromanyl expectorant, a Schedule V narcotic controlled substance.
>
> *You are instructed as a matter of law that these are controlled substances.*

R., Vol. IV, at 929-30 (emphasis added).

Despite the court's instructions, Dilaudid, for example, is not a Schedule II controlled substance as a matter of law; hydromorphone is. *See* 21 C.F.R. §1308.12(b)(1)(11); *see also Physician's Desk Reference* 1008 (36th ed. 1982). [hereinafter cited as *PDR*]

Similarly, Preludin is not a controlled substance as a matter of law; phenmetrazine is. *See* 21 C.F.R. §1308.12(d)(3); *see also PDR*, *supra*, at 680. Whether or not Dilaudid contains hydromorphone or Preludin contains phenmetrazine is a question of *fact* which the government must prove, either through testimony or the taking of judicial notice.

Rule 201(g), Fed.R.Ev., provides:

> *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. *In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.* (Emphasis added.)

In its report concerning the Federal Rules of Evidence, the House Judiciary Committee explained the difference between the manner in which a jury is to be instructed in a civil and criminal case with regard to judicially noticed facts:

> Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that *mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial*, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

H. Rep. No. 93-650, 93d Cong., 1st Sess. 6-7 (1973), *reprinted in* U.S. Code Cong. and Admin. News 7075, 7080 (1978)(emphasis added).

Thus, in *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978), the government failed to prove that South Central Bell Telephone was a common carrier which

provided facilities for interstate or foreign communications, an element of the wiretapping offense with which the defendant was charged. In affirming the post-trial entry of a judgment of acquittal, the Sixth Circuit first found that the telephone company's status as a carrier of interstate or foreign communciations was not within the common knowledge of the jury, which would have made proof of that fact unnecessary. *Id.*, at 222. The court then went on to hold that judicial notice of the status of South Central Bell could not be taken on appeal because Rule 201(g), with its constitutional underpinning, requires the *jury* in a criminal case to pass even upon facts which are judicially noticed. *Id.* at 224.

In petitioner's case, even if the trial court had taken judicial notice from *PDR* of the chemical names of the drugs at issue (which it did not), it would still have been required to instruct the jury that it could ignore such a finding. Perforce, the failure even to take judicial notice of the chemical identity of the drugs did not permit the trial judge to instruct the jury that the brand name drugs which the government was required to prove were among those proscribed by the statute and regulations were, as a matter of law, controlled substances.[10]

The effect of the Third Circuit's affirmance of petitioner's conviction in the face of this instruction was "to permit a partial directed verdict as to facts in a criminal case." *United States v. Jones, supra,* 580 F.2d at 224

---

10. *United States v. Anderson*, 528 F.2d 590 (5th Cir.), *cert. denied*, 429 U.S. 837 (1976), and *United States v. Piggie*, 662 F.2d 486 (10th Cir.), *cert. denied*, 449 U.S. 863 (1980), each involved the taking of judicial notice that a federal penal institution was within the special territorial jurisdiction of the United States. In each, the jury was not specifically advised, as required by Rule 201(g), Fed.R.Ev., that it need not accept the fact judicially noticed. The convictions were affirmed, however, because the trial judges had told the juries to treat the judicially noticed fact like the other evidence, and the juries were therefore aware that they were free to accept or reject those facts. Here, of course, the jury was instructed that it was bound as a matter of law by the trial judge's instructions that the drugs were controlled substances.

(footnote omitted). As the Sixth Circuit stated in *Jones, supra:*

> "If a court can take one important element of an offense from the jury and determine the facts for them because such facts seem plain enough to him, then which element cannot be similarly taken away and where would the process stop?"

Id., 580 F.2d at 224 n.8, *quoting State v. Lawrence*, 120 Utah 323, 234 P.2d 600, 603 (1951).

While the trial court's directing of a partial verdict was not challenged at trial, it should have been noticed by the Third Circuit and can be noticed by this Court because the error affected petitioner's substantial right to a trial by jury.[11] Rule 52(b), Fed.R.Crim.P.; *see Bollenbach v. United States*, 326 U.S. 607, 614 (1945); *United States v. Hayward*, 420 F.2d 142, 144-46 (D.C. Cir. 1969); *Bryan v. United States*, 373 F.2d 403 (5th Cir. 1967). The effect of the Court of Appeals' affirmance of petitioner's conviction was to sanction and participate in violations of Rule 201(g) and of the Sixth Amendment right to a trial by jury, upon which Rule 201(g) rests, thereby bringing the Third Circuit into conflict with the Sixth Circuit's opinion in *Jones, supra.*

This conflict justifies the grant of a writ of certiorari to review the judgment below.

---

11. In *United States v. Jones, supra*, the error was not raised at trial but only in a post-verdict motion for a new trial. *Id.*, 580 F.2d at 221.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Richard A. Sprague
William R. Herman
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, Pa. 19103
(215) 561-7681
Counsel for Petitioner,
Hratch K. Sarian

Of Counsel:
SPRAGUE & RUBENSTONE
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, Pa. 19103
(215) 561-7681

Dated: November 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1542

UNITED STATES OF AMERICA,
Appellee

v.

HRATCH K. SARIAN, t/a
HAROLD'S PRESCRIPTION PHARMACY,
Appellant

(On Appeal From the United States District Court
for the Eastern District of Pennsylvania)

(Criminal No. 82-0065 — E. D. of Pa.)

Argued June 10, 1983

(Filed August 5, 1983)

Before Seitz, *Chief Judge*, Sloviter, *Circuit Judge* and Brotman, *District Judge*.*

Richard A. Sprague, Esquire
Edward H. Rubenstone, Esq.
William R. Herman, Esq. (argued)
Sprague & Rubenstone
Suite 400, Wellington Bldg.
135 South 19th St.
Philadelphia, Pa. 19103
Attorneys for Appellant

---

* Hon. Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

Peter F. Vaira, Esq.
United States Attorney
Walter S. Batty, Jr.
Assistant U. S. Attorney
Chief of Appeals
Samuel M. Forstein, Esq. (argued)
Assistant U. S. Attorney
Rm. 3310, U. S. Courthouse
Philadelphia, Pa. 19106
Attorneys for Appellees

OPINION OF THE COURT

PER CURIAM.

Defendant appeals his sentences after conviction by a jury arising out of his ownership and operation of a pharmacy. He asserts numerous errors by the district court but we consider only the attack on the legal sufficiency of the first six counts of the indictment.[1]

---

1. The other alleged errors which we find without merit are as follows:

The Government never proved that the drugs which appellant allegedly distributed are proscribed by the Controlled Substances Act.

The Trial Court should have acquitted appellant on counts seven and eight because there was no evidence of Mr. Sarian's involvement in the alleged record keeping violations.

There was no evidence that appellant illegally distributed quaalude tablets [sic] or percodan and no competent evidence that he had failed to complete the DEA 222 Form as required.

The trial court's instructions affected appellant's substantial rights to a trial by jury and to a unanimous verdict.

By instructing the jury that the drugs named in the indictment were controlled substances as a matter of law, the trial court directed a partial verdict against appellant.

The trial court's instructions deprived appellant of his constitutional right to a unanimous jury verdict on counts two and three.

The maximum permissible fine which the court below could have imposed upon appellant's conviction of conspiring to distribute controlled substances was $5,000.

In count one, the defendant was charged, *inter alia*, with knowingly, intentionally and unlawfully conspiring with others to distribute certain identified drugs in violation of 21 U.S.C. §841(a)(1). One of the overt acts charged to defendant was placing orders with and receiving from drug violators quantities of controlled substances to sell outside the ordinary course of business of his pharmacy. In counts two through six, it was alleged that defendant knowingly, intentionally and unlawfully distributed and caused to be distributed certain identified highly abused narcotic controlled substances in violation of 18 U.S.C. §841(a)(1) and 18 U.S.C. §2. There are no allegations with respect to the distributions being outside the ordinary course of defendant's business as a pharmacist.

In this appeal, defendant challenges the sufficiency of his indictment with regard to counts one through six, contending that the indictment failed to charge all necessary elements of the crimes alleged. Specifically, defendant says the indictment should have alleged that defendant, registered with the DEA as a pharmacist, acted outside the usual course of his professional practice when committing the acts alleged. *See United States v. Moore*, 423 U.S. 122 (1975).

Because defendant did not raise this objection at trial, our standard of review is for plain error. *United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983). Under this rigorous standard, we may reverse only if the trial court committed error which amounts to a manifest miscarriage of justice. *United States v. Schreiber*, 599 F.2d 534, 535 (3d Cir.), *cert. denied*, 444 U.S. 950 (1979). Therefore, it will be necessary to reach the merits of defendant's contentions only if, assuming *arguendo* that the indictment should have alleged that defendant distributed controlled substances outside the ordinary course of his pharmacy business, the failure of the indictment to do so redounded to defendant's substantial prejudice.

An indictment serves two functions. It protects the defendant's sixth amendment right to be informed of the charges against him and it upholds the fifth amendment guarantee that prevents prosecution for infamous crimes without an indictment by a grand jury. *Russell v. United States*, 369 U.S. 749 (1962).

The various counts of the indictment identify the statutes allegedly violated. They identify the particular drugs distributed and the appropriate amount allegedly distributed, and they allege that such distributions were illegal. Furthermore, the conspiracy count specifically alleges an overt act was placing orders with and receiving from drug violators quantities of controlled substances to sell outside the ordinary course of business of his pharmacy.[2] In addition, the government's proof clearly entitled the jury to conclude that defendant was distributing such drugs outside the ordinary course of his pharmacy business.

The fifth amendment requires an indictment by a grand jury for infamous crimes. One of the overt acts charged in the conspiracy count against the defendant alleges that he conspired to sell outside the ordinary course of his pharmacy business. We think it reasonable to infer from this allegation that the grand jury had before it evidence of defendant's excesses and indicted him for his activity outside legally permissible limits as a pharmacist. At least, we cannot say that the indictment is so lacking in this assurance that we should consider the assumed deficiency as a manifest miscarriage of justice.

Similarly, given its allegations, we are unwilling to say that defendant's indictment is so lacking in informa-

---

2. We realize that a distinction is often drawn between the charging portion of a conspiracy count and the overt acts, but we think it is not impermissible to consider the overt act under the circumstances of this case despite any contradictory implication which may flow from *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979).

tion concerning the charges against him that a failure to take cognizance of defendant's contention for the first time on appeal would substantially prejudice the defendant with regard to his sixth amendment rights. We so conclude because of the overt act alleged and the other particulars set forth in the counts in question.

Finally, we note that the substantiality of the government's proof as to the defendant's distribution outside the course of his professional practice tends to ameliorate any residual prejudice that defendant might have experienced due to the omission of the alleged element. Therefore, based on all of the foregoing factors, we hold that defendant's challenge to the sufficiency of his indictment, raised for the first time on appeal, must be denied.

The judgment of the district court will be affirmed.

To the Clerk of the Court:

Please file the foregoing opinion.

Judge

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 82-1542

UNITED STATES OF AMERICA
v.
SARIAN, HRATCH K., t/a Harold's
Prescription Pharmacy

Hratch K. Sarian, *Appellant*

(D.C. Crim. No. 82-00065-01)
On Appeal From the United States District Court for the Eastern District of Pennsylvania
Present: SEITZ, *Chief Judge*, SLOVITER, *Circuit Judge*
and
BROTMAN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 10, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 31, 1982, be, and the same is hereby affirmed.

ATTEST:

Sally Mrvos
Clerk

August 5, 1983

---

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 82-1542

UNITED STATES OF AMERICA
v.
HRATCH K. SARIAN, t/a
HAROLD'S PRESCRIPTION PHARMACY,
Appellant
(Criminal No. 82-0065 — E.D.Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and BROTMAN, *District Judge.**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz
Chief Judge

Dated: September 7, 1983

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Criminal No. 82-00065
v.	:	
HRATCH K. SARIAN, t/a Harold's Prescription Pharmacy	:	Violations: 21 U.S.C. §846 (Conspiracy — One Count)
PAUL F. GAYNOR	:	21 U.S.C. § 841(a)(1) (Distribution of Controlled Substances — Five Counts)
SAMUEL I. GUTTLER	:	21 U.S.C. § 843(a)(4) (Omitting Material Information from Required Records — Two Counts)
	:	21 U.S.C. §842(a)(5) (Failure to Make, Keep or Furnish Required Records — One Count)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, in Philadelphia, in the Eastern District of Pennsylvania, and elsewhere,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER.

knowingly, intentionally and unlawfully did combine, conspire, confederate and agree together and with each other and with persons known and unknown to this

Grand Jury, to distribute the following controlled substances, in violation of Title 21, United States Code, Section 841(a)(1):

Dilaudid tablets, a Schedule II narcotic controlled substance
Preludin tablets, a Schedule II non-narcotic controlled substance
Percodan tablets, a Schedule II narcotic controlled substance
Ritalin tablets, a Schedule II non-narcotic controlled substance
Quaalude tablets (Methaqualone), a Schedule II non-narcotic controlled substance
Tussionex Suspension (Hydrocodone), a Schedule III narcotic controlled substance
Talwin tablets, a Schedule IV non-narcotic controlled substance
Bromanyl Expectorant (Codeine based syrup), a Schedule V controlled substance.

In furtherance of this conspiracy, the following persons did do and perform the following overt acts, among others, within the Eastern District of Pennsylvania:

OVERT ACTS

(1) At various times HRATCH K. SARIAN t/a Harold's Prescription Pharmacy, PAUL F. GAYNOR, and SAMUEL I. GUTTLER did distribute the highly abused controlled substances listed above.

(2) At various times HRATCH K. SARIAN t/a Harold's Prescription Pharmacy, PAUL F. GAYNOR, and SAMUEL I. GUTTLER did cause numerous false and forged drug prescriptions in the names of several doctors to be placed in the records of Harold's Prescription Pharmacy.

(3) At various times HRATCH K. SARIAN t/a Harold's Prescription Pharmacy and PAUL F. GAYNOR did place orders with and receive from several drug wholesalers quantities of controlled substances to sell outside the ordinary course of business of Harold's Prescription Pharmacy.

(4) At various times HRATCH K. SARIAN t/a Harold's Prescription Pharmacy omitted material information from records required to be kept by law.

(5) At various times HRATCH K. SARIAN t/a Harold's Prescription Pharmacy failed to make, keep and furnish certain records required by law.

(6) On the morning of October 17, 1980, HRATCH K. SARIAN knowingly and willfully attempted to conceal his knowledge concerning the distribution of the drugs listed above by declaring to federal agents that he did not know what happened to the drugs.

In violation of Title 21, United States Code, Section 846.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER

knowingly and intentionally did unlawfully distribute and cause to be distributed the following approximate quantities of highly abused Schedule II narcotic controlled substances: 19,230 Dilaudid 4 mg. tablets and 3,084 Percodan tablets.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER

knowingly and intentionally did unlawfully distribute and cause to be distributed the following approximate quantities of highly abused Schedule II non-narcotic controlled substances: 16,623 Preludin 75 mg. tablets, 12,503 Ritalin 20 mg. tablets, and 6,100 Quaalude (Methaqualone) tablets.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER

knowingly and intentionally did unlawfully distribute and cause to be distributed 7351.7 ounces of Tussionex Suspension (Hydrocodone), a highly abused Schedule III narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER

knowingly and intentionally did unlawfully distribute and cause to be distributed 261,276 Talwin 50 mg. tablets, a highly abused Schedule IV non-narcotic substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

From on or about August 19, 1979 to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy,
PAUL F. GAYNOR
and
SAMUEL I. GUTTLER

knowingly and intentionally did unlawfully distribute and cause to be distributed 1,956 gallons of Bromanyl Expectorant (Codeine based syrup), a highly abused Schedule V narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

From on or about August 19, 1979, to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy

knowingly and intentionally did unlawfully place false and fraudulent prescriptions for Schedule II, III, IV and V controlled substances in his pharmacy files, which prescriptions are material information in records which by law are required to be made, kept and filed by Harold's Prescription Pharmacy.

In violation of Title 21, United States Code, Section 843(a)(4).

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES:

From on or about August 19, 1979, to on or about September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy

knowingly and intentionally omitted material information from records required by law to be made, kept and filed in that

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy

failed to retain a copy of the invoice from the supplier for numerous purchases of controlled substances.

In violation of Title 21, United States Code, Section 843(a)(4).

COUNT NINE

THE GRAND JURY FURTHER CHARGES:

From on or about August 19, 1979 to September 10, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

HRATCH K. SARIAN
t/a Harold's Prescription Pharmacy

knowingly and intentionally refused and failed to make, keep and furnish a record required by law to be made, kept and furnished in that HRATCH K. SARIAN failed to record the date and quantity of numerous Schedule II substances received on the purchaser's copy of the Official (DEA 222c) Order Forms.

In violation of Title 21, United States Code, Section 842(a)(5).

A TRUE BILL:

_____
Foreman

_____
PETER F. VAIRA
United States Attorney

DEFENDANT

HRATCH K. SARIAN
108 Gulph Mills Rd., Radnor, Pa. 19087

Eastern District of Penna.
Docket No. 82-00065-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date August 30, 1982.

COUNSEL

☐ WITHOUT COUNSEL: However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL: Jos. C. Santaguida, Esq., Suite 1306, 1346 Chestnut St., Phila., Pa.

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE

☐ NOT GUILTY

FINDING AND JUDGMENT

There being a verdict of:

☐ NOT GUILTY. Defendant is discharged.

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy; aiding and abetting; distribution of controlled substances; omitting material information

from required records; failure to make, keep or furnish required records in violation of 21 USC §846; §841(a)(1); §843(a)(4); §842(a)(5); 18 USC §2.

SENTENCE OR PROBATION ORDER
SPECIAL CONDITIONS OF PROBATION
ADDITIONAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS plus a THREE (3) YEAR period of special parole under count 2. Under counts 3 and 4, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for periods of FIVE (5) YEARS plus THREE (3) YEAR periods of special parole. The sentences imposed under counts 3 and 4 shall run concurrently with each other and with the sentence imposed under count 2. Under count 5, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS plus a THREE (3) YEAR period of special parole. The sentence imposed under count 5 shall run concurrently with the sentence imposed under count 2. Under count 6, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR. The sentence imposed under count 6 shall run concurrently with the sentence imposed under count 2. Under counts 7 and 8, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for periods of FOUR (4) YEARS. The sentence imposed under counts 7 and 8

shall run concurrently with each other and with the sentence imposed under count 2. Under count 9, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR. The sentence imposed under count 9 shall run concurrently with the sentence imposed under count 2. Under count 1, the defendant shall pay a fine of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, and the imposition of a prison sentence is suspended, and the defendant is placed on probation for a period of FIVE (5) YEARS. The defendant stands committed until the fine is paid or he is otherwise discharged by law. The order that the defendant stands committed is stayed until NOON of September 1, 1982. The period of probation herein imposed shall run consecutively with the period of imprisonment imposed under count 2.

Execution of the sentences imposed under counts 2, 3, 4, 5, 6, 7, 8 and 9 is stayed for THIRTY (30) DAYS.

/s/ DANIEL H. HUYETT, 3RD

Daniel H. Huyett, 3rd, J.

* * * * *

A TRUE COPY CERTIFIED THIS 30th day of AUGUST, 1982.

by: FRANCIS E. DEVINE

Francis E. DeVine, Deputy Clerk

SIGNED BY ☒ U.S. District Judge
☐ U.S. Magistrate

DANIEL H. HUYETT, 3RD

Daniel H. Huyett, 3rd, J.
Date 8-30-82

No. 83-774

In the Supreme Court of the United States

OCTOBER TERM, 1983

HRATCH K. SARIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the failure of the indictment in this case to allege expressly that petitioner's narcotics distribution activities were outside the usual course of his pharmacy business did not amount to a "manifest miscarriage of justice."

2. Whether the district court's instruction to the jury that the drugs listed in the indictment were controlled substances "as a matter of law" amounted to plain error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-774

HRATCH K. SARIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. A7). The petition for a writ of certiorari was filed on November 7, 1983 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner and co-defendants Paul F. Gaynor and Samuel I. Guttler were convicted on five counts of unlawfully distributing controlled substances, in violation of 21 U.S.C. 841(a)(1)

(counts two through six), and of conspiring to do so, in violation of 21 U.S.C. 846 (count one). Petitioner also was convicted on three counts of failing to maintain accurate records relating to the purchase and dispensing of controlled substances, in violation of 21 U.S.C. 842(a)(5) and 843(a)(4) (counts seven through nine). Petitioner was sentenced to a total term of imprisonment of ten years, to be followed by three years' special parole and five years' probation, and was fined $25,000 (Pet. App. A16-A17).[1] The court of appeals affirmed (*id.* at A1-A5).

The evidence adduced at trial showed that in August 1979 petitioner, a registered pharmacist, purchased a pharmacy in Philadelphia, Pennsylvania, and hired two other pharmacists, co-defendants Gaynor and Guttler, to help him operate the business. During September and October 1980, acting pursuant to an administrative warrant, Drug Enforcement Administration investigators audited the pharmacy's records for the approximately one-year period petitioner had owned the pharmacy.[2] The audit revealed that during that period the pharmacy had received a total of more than 300,000 tablets of Dilaudid, Preludin, Quaalude, Ritalin and Talwin, 1, 956 gallons of Bromanyl, and 7,350 ounces of Tussionex Suspension that were unaccounted for in

---

[1]Specifically, petitioner was sentenced to ten years' imprisonment and three years' special parole on count two. He was sentenced to five years' imprisonment and three years' special parole on counts three and four, three years' imprisonment and three years' special parole on count five, one year's imprisonment on count six, four years' imprisonment on counts seven and eight and one year's imprisonment on count nine, all of which sentences were to run concurrently with the sentence imposed on count two. Petitioner was fined $25,000 on count one and sentenced to five years' probation to be served consecutively to the period of imprisonment imposed on count two. Pet. App. A16-A17.

[2]During the course of the audit, the investigators also examined the records of wholesale drug distributors that had sold drugs to petitioner's pharmacy (II C.A. App. 108-111).

prescription or inventory records.[3] In addition, the audit revealed that many of the prescriptions in the pharmacy's files did not contain the signature of the pharmacist who filled them or the date on which they were filled, or otherwise failed to conform to DEA regulations, and that many prescriptions were for extraordinary quantities of drugs. II C.A. App. 95-116.

During the course of the audit, petitioner admitted to the investigators that he had paid all of the bills for all of the drugs in the pharmacy and falsely stated that he had provided them with all of his purchase records. When confronted with the results of the audit, petitioner first claimed that he had no explanation for the shortages. II C.A. App. 161-162. Later that same day, petitioner told one of the investigators that "he wanted to confess to what happened to the drugs" and that "his life was threatened and somebody was going to blow up his business" (*id.* at 163).

Four months later, on February 20, 1981, the investigators seized petitioner's pharmacy records pursuant to a search warrant. Many of the prescriptions that had been reviewed during the audit had been altered by inclusion of the signatures of petitioner or his co-defendants, and some had been altered by inclusion of refill designations. A spot check of the purported patient addresses on 14 prescriptions revealed that 12 addresses did not exist and that the two legitimate addresses were not the residences of the patients indicated on the prescriptions. II C.A. App. 106-107, 166-168.

---

[3]That accounting credited the pharmacy with all prescriptions in its files, including many prescriptions that the investigators suspected were invalid and that later proved to have been forged (II C.A. App. 114-115).

The trial testimony of five physicians whose names appeared on the seized prescriptions established that many of the signatures had been forged (II C.A. App. 57-60, 132-138, 228-235, 248-251, 258-262). In addition, three pharmacists who had interned at petitioner's pharmacy during the audit period testified that all three defendants had filled suspicious looking or "phony" prescriptions and had dispensed unusually large quantities of drugs without prescriptions, often to the same customer (III C.A. App. 316-319, 360-386, 390-400, 590-600, 607-610). One intern had observed a list hanging behind the pharmacy counter that quoted higher prices for filling phony prescriptions (*id.* at 596) and had noticed petitioner counting large sums of money on days when phony prescriptions had been filled (*id.* at 609-610). Finally, a witness who recently had been convicted on federal drug charges testified that he had purchased large quantities of Bromanyl from petitioner and his co-defendants, either by using illegitimate prescriptions or without prescriptions (*id.* at 475-488, 506).

ARGUMENT

1. Section 841(a)(1) of Title 21 makes the distribution or dispensing of drugs unlawful "[e]xcept as authorized by this subchapter." Section 822(b), in turn, provides that "[p]ersons registered * * * under this subchapter to * * * distribute, or dispense controlled substances are authorized to possess, * * * distribute, or dispense such substances * * * to the extent authorized by their registration and in conformity with the other provisions of this subchapter." Section 822(b) does not create a "blanket authorization" for registered practitioners to dispense controlled substances, but merely exempts them from conviction under Section 841 unless "their activities fall outside the usual course of professional practice." *United States* v. *Moore*, 423 U.S. 122, 124, 131 (1975). Petitioner, a registered pharmacist, contends (Pet. 8-13) that the exception provided in Section

822(b) is an element of the offense proscribed in Section 841 and that, therefore, his indictment was fatally deficient because it failed to allege that he had acted outside the usual course of his professional practice. Petitioner's contention is without merit.

By the plain terms of the statute, the presence of a legitimate medical purpose for dispensing controlled substances is a statutory exception to Section 841(a)(1), not an essential element of the offense that must be alleged in the indictment. Moreover, 21 U.S.C. 885(a)(1) expressly provides:

> It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

Thus, even assuming the government bears the ultimate burden of proof on the issue, it is not required expressly to allege in the indictment that the drugs were distributed outside the usual course of a registered practitioner's practice. See *United States* v. *Seelig*, 622 F.2d 207, 211-212 (6th Cir.), cert. denied, 449 U.S. 869 (1980). See also *United States* v. *Roya*, 574 F.2d 386, 391 (7th Cir.), cert. denied, 439 U.S. 857 (1978). As petitioner notes (Pet. 10), two courts have reached a contrary result. See *United States* v. *Outler*, 659 F.2d 1306, 1308-1311 (5th Cir. 1981); *United States* v. *King*, 587 F.2d 956, 963-964 (9th Cir. 1978). In neither of those cases, however, did the court address, or even appear to be aware of, Section 885(a)(1).

In any event, this case does not present a suitable vehicle in which to resolve the question whether the medical exception must be expressly negated in the indictment, because the court of appeals did not answer that question. Because petitioner failed to object to the indictment at trial, the court of appeals limited its consideration of the sufficiency of the indictment to the question whether the asserted defect "amount[ed] to a manifest miscarriage of justice" (Pet. App. A3). The holding of the court of appeals thus represents only a determination (*ibid.*) that, "assuming *arguendo* that the indictment should have alleged that [petitioner] distributed controlled substances outside the ordinary course of his pharmacy business," the failure of the indictment to do so did not "redound[] to [petitioner's] substantial prejudice."[4]

That conclusion is entirely correct. As the court of appeals held (Pet. App. A4-A5), and as petitioner does not dispute (see Pet. 11 n.6), the indictment afforded petitioner adequate notice of the charges against him. Moreover, the court correctly concluded (Pet. App. A4-A5) that petitioner's Fifth Amendment right to an indictment by grand jury was not violated by the failure to allege expressly that petitioner's narcotics activities were outside the ordinary course of his pharmacy business:

> One of the overt acts charged in the conspiracy count against [petitioner] alleges that he conspired to sell outside the ordinary course of his pharmacy business. We think it reasonable to infer from this allegation that

---

[4]Although, as petitioner notes (Pet. 13), the failure of an indictment to charge an offense may be raised at any time (see Fed. R. Crim. P. 12(b)(2)), "failure to object until after the verdict dictates that the indictment be construed liberally and not held invalid absent a showing of actual prejudice." *United States* v. *Previte*, 648 F.2d 73, 80 (1st Cir. 1981); see also *United States* v. *Hart*, 640 F.2d 856, 857-858 (6th Cir.), cert. denied, 451 U.S. 992 (1981).

> the grand jury had before it evidence of [petitioner's] excesses and indicted him for his activity outside legally permissible limits as a pharmacist. At least, we cannot say that the indictment is so lacking in this assurance that we should consider the assumed deficiency as a manifest miscarriage of justice.
>
> * * * * *
>
> Finally, we note that the substantiality of the government's proof as to [petitioner's] distribution outside the course of his professional practice tends to ameliorate any residual prejudice that [petitioner] might have experienced due to the omission of the alleged element.[5]

Petitioner's reliance (Pet. 11-12) on *Joplin Mercantile Co.* v. *United States*, 236 U.S. 531, 535-536 (1915), for the proposition (Pet. 12) that "an overt act cannot be used * * * to save an otherwise deficient substantive count" is misplaced. In *Joplin*, the Court opined that allegations made in the overt act clauses of a conspiracy indictment could not supply an element missing from the "agreement" clause of the indictment because "the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number" (236 U.S. at 536). That observation is inapposite to the present case, however, because the overt act on which the court below relied was specifically alleged to have been committed by petitioner (I C.A. App. 8a).[6]

---

[5] We note that petitioner's defense at trial was that he had nothing to do with the charged activities, not that the charged activities were for legitimate medical purposes (IV C.A. App. 724-782).

[6] The Court's observation in *Joplin* in any event was dictum, in view of its conclusion that the omitted allegation was not an element of the offense charged and consequent affirmance of the conviction. Similarly, in *United States* v. *Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979),

2. Petitioner's further contention (Pet. 13-18), that the district court's instruction to the jury that the brand name drugs listed in the indictment were controlled substances "as a matter of law" amounted to a " 'partial directed verdict,' " also is without merit.

We note at the outset that petitioner failed to object at trial to the instruction he now challenges in this Court, notwithstanding that the government proposed the instruction in writing and that the district judge held a conference on the proposed instructions at which he approved the instruction now challenged (IV C.A. App. 808-809, 941). By failing to object to the instruction either at the time it was proposed or when it was given, petitioner failed to comply with the contemporaneous objection requirement contained in Rule 30 of the Federal Rules of Criminal Procedure. Accordingly, as petitioner concedes (Pet. 18), he would be entitled to reversal of his conviction only if the instruction constituted plain error or affected his substantial rights. See Fed. R. Crim. P. 52(b). That clearly is not the case here.

Contrary to petitioner's assertion (Pet. 14-15), there was substantial evidence that the drugs petitioner was charged with having distributed were controlled substances. The DEA case agent testified that he and the other investigator conducted an inventory of the *controlled substances* in petitioner's pharmacy (II C.A. App. 97-102). The inventoried substances were the same drugs listed in the indictment, (compare II C.A. App. 188-189 and Gov't Exh. VII with I C.A. App. 7a, 9a-13a). In addition, the agent expressly

---

on which petitioner also relies (Pet. 12), the court upheld the conspiracy conviction notwithstanding the failure of the indictment to allege all of the elements of the offense. In any event, any conflict between the decision below and *Wander* is for the Third Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Cf. Pet. App. A4 n.2.

testified that the drugs listed in the indictment were controlled substances (II C.A. App. 115-116, 188-189). There also was medical testimony to the effect that four of the drugs listed in the indictment (Bromanyl, Tussionnex, Dilaudid, and Percodan) contain narcotic elements and that three of those drugs are controlled substances (II C.A. App. 134, 232, 260; III C.A. App. 592).[7] One of petitioner's suppliers further testified that four of the drugs included in the indictment and regularly purchased by petitioner's pharmacy (Preludin, Percodan, Ritalin, and Quaalude) are controlled substances (II C.A. App. 270-273).

Moreover, petitioner did not contest at trial—and does not now dispute—that the drugs that he was charged with unlawfully distributing were in fact controlled substances. In these circumstances, it is beyond doubt that the district court's instruction to the jury that the drugs listed in the indictment were controlled substances "as a matter of law" could not have adversely affected petitioner's substantial rights. See, *e.g., United States* v. *Piggie*, 622 F.2d 486, 488 (10th Cir.), cert. denied, 449 U.S. 863 (1980) (holding that reversal of the defendant's conviction simply because the trial court failed to instruct the jury that it was not required to accept a judicially noticed element of the offense "would be an exercise in the absurd" where there was evidence of the judicially noticed element in the record and where the element was not seriously in dispute);[8] see also *McGuinn* v.

---

[7]According to the medical testimony, Ambenyl and Bromanyl refer to the same drug (II C.A. App. 154).

[8]Petitioner errs in stating (Pet. 17 n.10) that the reason the court of appeals upheld the conviction in *Piggie* was that "the trial judge[] had told the jur[y] to treat the judicially noticed fact like the other evidence, and * * * they were free to accept or reject those facts." To the contrary, the court of appeals refused to set aside the conviction in *Piggie* notwithstanding the fact that the jury may have considered itself "bound by the court's taking judicial notice" (622 F.2d at 488). Indeed, although the district court instructed the jury that it was the exclusive judge of the

Crist, 657 F.2d 1107, 1108-1109 (9th Cir. 1981) ("[w]hen a jury is properly instructed with respect to the only disputed issues in the case, the erroneous instruction with respect to an undisputed issue is harmless error").

Finally, contrary to petitioner's assertion (Pet. 16-18), the refusal of the court of appeals (Pet. App. A2 n.1) to reverse petitioner's conviction on the basis of the challenged instruction does not conflict with the Sixth Circuit's decision in *United States* v. *Jones*, 580 F.2d 219 (1978). In that case, the court of appeals reversed a conviction for illegally intercepting telephone conversations where "the government offered no evidence to show that South Central Bell was at the time a 'person engaged as a common carrier in providing or operating . . . facilities for the transmission of interstate or foreign communications,' " as required by 18 U.S.C. 2510(1). 580 F.2d at 221. By contrast, as we showed above, there was ample evidence in the record of this case that the drugs listed in the indictment were controlled substances and, indeed, petitioner never has contended otherwise. In these circumstances, it cannot seriously be claimed that petitioner's substantial rights were affected by the challenged instruction.

---

evidence, including " 'all facts which may have been admitted or stipulated' " (622 F.2d at 489), it did not refer expressly to facts judicially noticed. Accordingly, the court of appeals alluded to these additional general instructions only in an appendix to its opinion (*ibid.*); they plainly did not serve as the basis for its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

JANUARY 1984

DOJ-1984-01